No. 15219

In the United States Circuit Court of Appeals For the Ninth Circuit

CENTURY INVESTMENT CORPORATION and VIRGIL J. PAGUE, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellees.*

ARTHUR G. BARNETT and VIRGINIA N. BARNETT, His Wife; DONALD F. OWENS and JEAN OWENS, His Wife; EDWARD R. ESTER and LORRAINE M. ESTER, His Wife, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Hon. John C. Bowen, *Judge*

Brief of Century Investment Corporation and Virgil J. Pague

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I.

JURISDICTION

This is an appeal from an action commenced in the United States District Court for the Western District of Washington, Northern Division, on behalf of the United States by the United States District Attorney. The action is based upon a contract to which the United States is a party and according to the Complaint jurisdiction is based upon Title 28, U.S. Code, Section 1345. This is an appeal from the final judgment in that case.

This action was instituted by a Complaint in a civil action in which it was alleged that the Century Invest-

ment Corporation had entered into a contract for the purchase of certain buildings belonging to the Public Housing Administration with the stipulation that they be removed from the site within a certain time. The Complaint alleges that a $5,000 bond was posted to ensure performance of the contract and that four of the buildings, namely, Nos. 102, 103, 104 and 105 were not removed from the site, and were being rented by the defendants upon the site (Tr. 3). Plaintiff prayed for an order requiring the removal of the buildings and praying for an accounting of the funds collected by the defendants from tenants and for the allowance of damages to the plaintiff for failure of the Century Investment Corporation to complete its removal contract and for other relief.

Defendant Pague answered the Complaint (Tr. 33) denying that he had entered into any contract with the government and alleging that he had acquired from Century Investment Corporation certain of the buildings and was the legal owner thereof and denied that the buildings were temporary and admitted that he had rented certain apartments therein, and otherwise the allegations in the Complaint were denied. By a first affirmative defense defendant Pague alleged that he was the owner of the land upon which building 102 stands and the owner or lessee of the land upon which

103 stands, and that the buildings had been modified to meet all requirements of the building code of the City of Seattle, and further alleging that the buildings were vitally needed for public housing and approval had been obtained from the City of Seattle for them to be located in the future upon the land where they then stood. It was also affirmatively pleaded that any interest of the government in the land where the buildings stood, either had terminated or would terminate shortly and the owners of the land would not hold the government to any obligation to remove the buildings therefrom, and that the government would suffer no damage if the buildings remained upon the sites where they were located, and further pleadings that no good or equitable purpose could be served by requiring the removal of the buildings. By a second affirmative defense defendant Pague alleged that the tenure of the government on the land on which the buildings stood had expired and that the government was wrongfully asserting the right to possession and this defendant prayed that title to buildings 102 and 103 and the land upon which they stood be quieted against the government (Tr. 33).

The answer of Century Investment Corporation (Tr. 36) admits entering into the contract attached to the Complaint and alleged that the time for completion of the removal of the buildings was extended and that it was led by agents of the government to believe that certain buildings might be made to conform to the require-

ments of the building code of the City of Seattle and might be allowed to remain in place as permanent type buildings, and in reliance thereon buildings 102, 103, 104 and 105 were modified without removing them from the site so that they were no longer temporary buildings, and it is further admitted that Virgil J. Pague had purchased from Century Investment Corporation buildings 102 and 103. By affirmative defense Century Investment Corporation set up virtually the same affirmative matter as was affirmatively pleaded by defendant Pague.

After a trial, judgment was entered awarding damages to the government against Virgil J. Pague and Century Investment Corporation jointly and severally, in the sum of $5,937.13 and awarding damages against Century Investment Corporation and various other defendants, jointly, in the respective sums of $3,709.31 and $2,432.59, and all the defendants were required to pay a sum equal to three-fourths of the amounts allowed a special master for an accounting in the case. Defendants Virgil J. Pague and Century Investment Corporation have appealed from the judgment (Tr. 120).

II.

STATEMENT OF THE CASE

According to the Findings of Fact made by the trial court the Century Investment Corporation purchased, pursuant to an advertisement for bids, buildings numbered 101 through 110 in the Duwamish Bend housing area, City of Seattle (Tr. 62). These buildings were located upon land as to which the government had condemned leaseholds in the year 1945 (Tr. 71) in Civil Action No. 1143 in the District Court for the Western District of Washington, Northern Division, under the authority granted by the Lanham Act, public law 849 76 Congress, as amended, 42 U.S.C. 1521 (Tr. 63).

Virgil J. Pague was one of the stockholders and was the President of Century Investment Corporation (Tr. 66) there being two other officers and principal stockholders in the corporation (Tr. 65). The corporation proceeded to sell and remove the buildings from the site except for buildings 102, 103, 104 and 105 (Tr. 68). Building 102, which was located partially upon certain of the lots leased pursuant to the government's condemnation and upon certain street areas, was acquired from the corporation by Virgil J. Pague, and the same is true of building 103 (Tr. 68 and 69). Building 104 was acquired through *mesne* conveyance from Century Investment Corporation by defendants Barnett and Owens (Tr. 69) and building 105 was acquired by defendants Ester (Tr. 70). Each of the defendants ac-

quired the fee title to the land underlying the buildings, or acquired a leasehold from the fee owner (Tr. 68, 69, & 70). By the terms of the declaration of taking under which the government had acquired the leaseholds, the government was " * * * granted the right to renew said exclusive use without the consent of the owners of said land from year to year, not to exceed three years after the termination of the national emergency as declared by the President of the United States; which national emergency was that declared to exist by presidential proclamation of September 8, 1939" (Tr. 71). The government had continued to file notices of its intention to renew until the period extending to February 21, 1956 (Tr. 71). Defendants had refused consent to renewal (Def. Ex. A3, A4; Tr. 52). Each of the defendants knew of the requirement in the contract of Century Investment Corporation for the removal of the buildings and had made efforts to obtain a modification (Tr. 71). The defendants had secured from the City of Seattle a resolution authorizing the continuance of the buildings on the site and had secured from the Board of Public Works permits for leaving the buildings on the site (Tr. 72 and 73).

The lower court held by its conclusion of law No. VII that the Century Investment Corporation breached its contract by failing to remove buildings 102, 103, 104 and 105 from the site and by purporting to convey them to the defendants without requiring them to be removed

(Tr. 76). By Findings of Fact and Conclusions of Law entered on October 20, 1955, the court found that the defendants should be required to remove the buildings from the sites (Tr. 77 and 78). However, by supplemental Findings of Fact and Conclusions of Law (Tr. 107) dated April 26, 1956, the trial court found that the government had not sustained the burden of proving that it had paid the rent necessary to keep the leasehold alive on the property underlying the buildings (Tr. 108), and the court rescinded the order to require specific removal of the property, but stated (Tr. 109):

> " * * * Instead of compelling specific performance of removal and site clearance require the defendants to pay a fair, reasonable and just compensation by way of damages for their failure to remove and clear the sites of, and for their wrongful commercial use of said buildings and to comply with all of the requirements of the contract of sale."

By Paragraph XII of the original Conclusions of Law Tr. 80) the court concluded:

> "That the plaintiff has been damaged by the wrongful use of said buildings by the defendants from the time of said breaches of contract by defendant Century Investment Corporation in using same for commercial rental purposes to and including the present time and for such future time as said buildings remain on site, and for the wrongful use of the land underlying said buildings and defendants continue to so use said buildings and property, which is for the exclusive use of the plaintiff from said time of said breaches of con-

> tract to and including the present time; that the plaintiff is entitled to a complete accounting to be performed under the direction of the court, of all revenues received from and current operating expenses incidental to such commercial uses to determine monetary damages sustained by the plaintiff on account of the alleged breach of contract herein, and that the court should retain jurisdiction of this action for these reasons and should fix a date for the hearing on same."

Pursuant to that conclusion, the court entered an order appointing a special master (Tr. 82) by which it was ordered that an accounting of funds received by each of the defendants from the unauthorized use of buildings 102, 103, 104 and 105 be had. The special master issued a report, transmitted to this court as Item 107 under the certificate of the Clerk of the District Court to Record on Appeal (Tr. 126). By this report it was determined that the net income of defendant Pague from the rental of buildings 102 and 103 amounted to $5,937.13, and judgment was entered against defendant Pague and Century Investment Corporation for that amount (Tr. 116). Amounts similarly arrived at were entered against other defendants and Century Investment Corporation jointly (Tr. 116). Defendant Virgil J. Pague moved to strike the supplemental report of the special master (Tr. 95) before the same was confirmed. The grounds for that motion are stated as follows (Tr. 95):

> "Defendant Virgil J. Pague moves to strike the supplemental report of special master for the

reason that the same is a report of irrelevant facts having no relation to damages due plaintiff or to any issue properly before the court in this case. This motion is also made for the reason that the report of special master has not been made nor filed in conformity with the rules applicable thereto. This motion is made for the reason that the report is made upon a fundamentally wrong basis, having been made wholly without reference to the value of the plaintiff's leasehold or damage thereto, or to any monetary damage suffered by plaintiff by any breach of contract or action of any of the defendants, and further for the reason that the rule of court relative to special masters had not been complied with in the filing of the transcript herein."

By the Findings of Fact, (Tr. 73) it appears that the government lost any right to the street areas occupied by the buildings as of October 28, 1953, and as of December 9, 1953, the defendants had been given those rights (Tr. 73). No cognizance of the defendants' exclusive rights in the street areas was had by the master in determining the profits and no finding was made by either the court nor the master as to the value of the government's leasehold. No evidence was introduced by the government as to any actual damages suffered by it from the breach of contract. By the terms of the contract the government's rights in the event of failure of the purchaser to comply with all the terms of the contract was stated in Paragraph 6 of the general conditions (Tr. 16) as follows:

> "In the event the purchaser fails to complete the removal and clean-up operations within such period of time, the government may take possession of any property still on the site, destroy and otherwise dispose of it and may charge the purchaser for the cost of removing the dwellings and cleaning up the site without crediting the purchaser with the salvage value of the material or construction work removed."

Under paragraph 2 of the General Conditions of the contract (Tr. 13) performance security was provided for as follows:

> "Performance Security. The Purchaser shall within five days of the delivery to the Purchaser of an executed copy of the contract supply (in addition to payment in full of the contract price) performance security in the form of a certified check, cashier's check or money order payable to the Seattle Housing Authority in the amount required under Section 3 of the Invitation to Bid, or shall supply a performance bond in a like amount. The Purchaser is liable for any expense incurred by the Government as a result of his failure to abide by the terms of this sale, including the removal of the units sold hereunder within the time stated herein and leaving the site in a satisfactory condition. The Purchaser shall be liable for the full amount of damages *determined by the Contracting Officer* to have been occasioned by his failure to comply with provisions of this sale, whether or not such damages are secured by the performance security." (Emphasis supplied)

No evidence was produced that the Contracting Officer ever made any determination of damages.

III.

QUESTIONS INVOLVED

This case involves the following questions:

1. Whether under a contract providing for damages to be determined by a Contracting Officer, the court may award damages in the absence of any such determination by the Contracting Officer. This question is raised by the specific terms of Paragraph 2 of the general conditions of the contract (Tr. 13).

2. Whether in the absence of proof of actual damages the United States may recover the net profits earned by one trespassing upon the government's leasehold. This question is raised by the award of damages against the defendants who are not parties to the contract for removal based upon their use of buildings or land supposedly under government leasehold.

3. Whether a leasehold acquired by condemnation in 1945 renewable for three years after the existing emergency could be continued without the consent of the fee holders of the land until July, 1956, where the government had failed to pay the taxes which were a material portion of the compensation awarded in the condemnation proceedings to the fee holders. This question is raised because the defendants as fee holders of the land had refused to consent to renewal after their acquisition of the property and the court found that the plaintiff had not paid that portion of the condemnation

award consisting of payment of current taxes (Tr. 108).

IV.

ASSIGNMENTS OF ERROR

The lower court erred in the following respects:

1. The court erred in awarding damages against these appellees in the absence of any competent proof of damage.

2. The court erred in ordering an accounting.

V.

ARGUMENT

1. THE COURT ERRED IN AWARDING DAMAGES IN THE ABSENCE OF COMPETENT PROOF

A. The Contracting Officer has not determined the Amount of Damages.

The government's suit against Century Investment Corporation must be based upon the contract since Century Investment Corporation did not itself continue to maintain the buildings on site but Century Investment Corporation had sold them to the other defendants prior to the end of the time for completion under the contract, and the liabiliy, if any, of Century Investment Corporation must be that for breach of contract. The contract in this case spells out the remedies of the government in case of breach of contract, and it is not competent for the courts to make a new contract for the parties or to depart from the provisions of the contract with respect to the ascertainment of damages.

By the General Conditions of the contract, which were a part of it, Paragraphs 2 and 6 set out exactly what can be done in case of failure to perform by the contractor. Paragraph 2 (Tr. 13) reads in its material part as follows:

> "The purchaser is liable for any *expense incurred by the government* as a result of his failure to abide by the terms of this sale, including the removal of the units sold hereunder within the time stated herein and leaving the site in a satisfactory condition. The purchaser shall be liable for the full amount of damages *determined by the Contracting Officer* to have been occasioned by his failure to comply with provisions of this sale whether or not such damages are secured by the performance security." (Emphasis supplied)

It will be noted that the liability of the purchaser is expressed in the foregoing quotation as being for "any *expense* incurred by the government as a result of his failure to abide by the terms of this sale." It should be noted further that the parties have contracted as to the person who shall determine the amount of the damages, and have designated the "Contracting Officer." The term Contracting Officer is defined in the contract in Section 11 (Tr. 18) as follows:

> "The term Contracting Officer shall mean the person signing this contract for the government or his duly authorized successor in office and any person authorized to act for him as his duly authorized representative."

In this case the government introduced no evidence to the effect that the Contracting Officer had ever made any determination of the amount of the damages for which the purchaser should be liable. A determination by the Contracting Officer is, under the terms of the contract, a condition precedent to liability by the purchaser for damages. No evidence was introduced to show that *any expense* was incurred by the government as a result of the failure of the contractor to abide by the terms of the sale. The damages in this case do not purport to be based upon either a *decision by the Contracting Officer* as to the amount of the damages, or upon *expenses incurred by the government,* but are based upon the master's ascertainment of the amount of profit earned by the defendant Pague from renting the property. This is in accordance with the instructions given the master by the order appointing him (Tr. 82).

The damages in this case have been assessed upon a basis wholly different from that contemplated by the parties in their contract. Where the parties contracted that a determination of facts should be made by the Contracting Officer, such a determination is binding on the courts and is reviewable only for mistakes in law. *General Steel Products Company v. U. S.,* 36 Fed. Supp. 498. There was a failure of proof in the government's case when they did not establish that any determination had been made by the Contracting Officer as provided in the contract. Such a determination is a

condition precedent to any review of damages by the court and an award of damages without a determination by the Contracting Officer is an award in disregard of the express terms of the contract.

The remedies of the government are set out in their entirety in Paragraphs 2 and 6 of the general conditions. Paragraph 2 alone deals with damages. Paragraph 6 (Tr. 16) gives the government the extraordinary right to perform the work of removal itself and charge the contractor with it. The pertinent part of Section 6 reads:

> "In the event the purchaser fails to complete the removal and clean-up operations within such period of time, the government may take possession of any property still on the site, destroy and otherwise dispose of it, and may charge the purchaser with the cost of removing the dwellings and cleaning up the site without crediting the purchaser with the salvage value of the material or construction work removed."

The remedies of the government have thus been spelled out exactly. These were the risks that the purchaser took with respect to the eventuality of a failure to perform. The contractor cannot be charged with a contract obligation for breach of contract greater than those which it assumed. The government did not undertake to use the remedy provided for in Section 6 of the general conditions, nor is there any proof that it invoked the remedy prescribed in Section 2 since no determination of the Contracting Officer was proved and damages have

of the government by leaving the houses on the property, the measure of damages is not the profits which he made therefrom, but rather the value of the use of the property. This court in the case of *U. S. v. Bernard,* 202 Fed. 728, held in a case where one had wrongfully used government range land as follows:

> "The measure of damages for an appropriation of land by a continuing trespass is the worth of the use of the property."

In this case there was no evidence as to the worth of the use of the property. In the same case from which we have just quoted, this court also said vindictive damages would not be allowed for a trespass. The court said on page 731:

> "By applying to a court of equity the claimant waives all right to vindictive damages."

The court added:

> "The function of a court of equity goes no further than to award compensatory damages."

This is an equity proceeding and there is no relation between the damages awarded based upon the profit made by the defendants and compensation for any expense incurred or loss suffered by the government. There is no proof of any loss by the government.

2. THE COURT ERRED IN ORDERING AN ACCOUNTING

In this case the court ordered an accounting and included in the judgment against these defendants ¾ of the fee of the master. This is a sizeable item, amounting to $1,937.25. The accounting was not justified in this

case and the court erred in ordering it. The result of the accounting did not in any way contribute, nor under the order of the court setting up the accounting, could it contribute to any determination of damages.

This is not a case in which there was any fiduciary relationship between the parties and it was not pleaded nor proved that the government had any interest whatsoever in any amounts which might have been collected by the defendants from tenants on the premises. An accounting is not obtainable simply because there are accounts. Defendant Pague in this case was not a party to the contract, and so any damages against him must have been based upon a trespass or unauthorized use of government property. The Supreme Court of the United States in the case of *United States v. Bitteroot Development Company,* 200 U.S. 451, 50 L.Ed. 550, held that in a case of trespass upon government land even where there were damages by the cutting of timber there was no right to an accounting since the trespass is compensable in damages and is subject to a legal remedy. The court pointed out that the measure of damages was the loss to the United States rather than an accounting of the profits made by the defendants. That case is fully applicable here. An accounting is an equitable remedy available only under well-defined circumstances. 1 C.J.S. 646 states the rule as follows:

> " * * * nevertheless a court of equity will not take jurisdiction of every transaction in which there are accounts to be adjusted. So, although it has

> been said that matters of account are of equitable cognizance, and the broad statement has been made that such matters of account are *per se* within the scope of equitable jurisdiction, the true rule is that the mere existence of an account will not confer jurisdiction, and that, to warrant the interference of equity, there must be a fiduciary relation, or mutual or complicated accounts, or a need of discovery, or some other special ground of equitable jurisdiction, such as fraud, unless the circumstances of the fraud are such that adequate relief could be had in a court of law."

Plaintiff's rights to recover for breach of contract are those specified in the contract. The buildings in this case were not, under any reasonable interpretation of the contract, the property of the Government after they had been sold, and there was nothing in the contract by which the Government retained any right to an accounting from any profits made from them.

The contract with the Government was not merely a contract for service, but was a *sale*. Paragraph 2 of the document designated "Offer and Acceptance of Offer" (Tr. 19) reads:

> "The purchaser offers and agrees to purchase from the seller and to remove the property set forth and described in Attachment A * * * "

This is language of sale. The Century Investment Corporation was the purchaser of the property. There is nothing in the contract to make the passing of title contingent upon prior removal of the buildings from the site. All of the language used in the contract documents

referred to the transaction as being one of sale. Thus, paragraph 1 of the "Invitation to Bid" which was incorporated by reference into the contract (Tr. 10) reads in part: " * * * The United States of America * * * has offered to sell for offsite removal the property as follows and hereinafter listed on Attachment A." This was clearly an offer to sell the property, and the offsite removal was an incident of the sale, but the transaction was a sale nevertheless. In the same paragraph that we have just quoted from, occurs the following (Tr. 11): "Each sales unit is offered separately, and purchasers may remove from the site in any feasible manner, either intact or as salvage material." This is wholly inconsistent with any contention that title did not pass until after removal. The purchaser, by this contract, was free to do as it pleased with the property after it acquired title. The conditions of the sale clearly implied an immediate passing of title. Thus, under paragraph 5 of the "General Conditions" (Tr. 16) we find the following: "The purchaser shall assume responsibility and be liable from and after the date of delivery to the purchaser of an executed copy of this contract for the care and protection of the property conveyed by this instrument." It is readily apparent from the foregoing quotation that the Government retained no property right in the buildings after the execution of the document of sale. Paragraph 6 of the General Conditions (Tr. 16) provides in part:

"The purchaser shall not commence work until he has made payment in full of the purchase price * * * " Thus, it will be seen that any work is contingent upon completion of the sale of the property. Since title to the property passed upon execution of the contract, the Government is in no position to claim an accounting for profits from the buildings since the Government was not the owner of the buildings and would have no interest in any rentals or income derived therefrom.

The Government remedies are contained in th contract itself. Paragraph 6 of the General Conditions (Tr. 16) provides: "In the event the purchaser fails to complete the removal and cleanup operations within such period of time, the Government may take possession of any property still on the site, destroy or otherwise dispose of it and may charge the purchaser with the costs of removing the dwellings and cleaning up the site without crediting the purchaser with the salvage material or construction work removed." The Government did not invoke that remedy, and at this time could not do so without trespassing upon private property in which it has no interest or estate. No expenses have been incurred by the Government under the section just quoted and, of course, there is no occasion for any accounting by reason of that section. The Government has no interest in the income from the property and there is no occasion for an accounting.

It was error for the court to order an accounting and consequently that portion of the judgment assess-

ing costs of accounting against these defendants should be set aside.

This is not an action for compensation for the use of government property since such a prayer is not within the pleadings in the case and in any event there was no government property used. We have already discussed the fact that by the terms of the sale, title to the buildings themselves passed from the government, and we should like further to point out that during the time that these buildings remained on the land subsequent to the original removal date, the government was actually without tenure on the land. It is clear that the government had no tenure to the street areas after October 28, 1953, and the court has so found in paragraph 15 of the Findings (Tr. 73) and such tenure was actually in the defendants after December 9, 1953 (Tr. 73). With respect to the ground occupied by the buildings other than the street areas, the defendant Pague was the owner of the land or had the right to possession of the land upon which buildings 102 and 103 stood and other defendants were likewise the fee owners of the land upon which buildings 104 and 105 stood. The court has held that the government failed to meet the burden of the proof with respect to the payment of the compensation prescribed in the condemnation proceeding in paragraph II of the Supplemental Findings of Fact (Tr. 108), and paragraph I of the Supplemental Conclusions of Law (Tr. 111). There is no evidence that the defendants had consented to any renewal of the

leasehold after their title to the land was acquired and the failure of the government to make or tender the payments of the designated consideration for the leasehold served as a condition subsequent to terminate leaseholds. In the case of *Cherokee Nation v. Southern Kansas Railway Company,* 135 U.S. 641, 34 L.Ed. 295, the United States Supreme Court expressly stated that where the condemnor does not pay the compensation within a reasonable time it becomes a trespasser. The court said on page 660:

> "But clearly the title does not pass until compensation is actually made to the owner. Within the meaning of the Constitution the property, although entered upon pending the appeal, is not taken until the compensation is ascertained in some legal mode, and being paid, passes to the owner. Such was the decision in *Kennedy v. Indianapolis,* 103 U.S. 599, where the court construed a clause in the Constitution of Indiana declaring that no man's property shall be taken or applied to public use, * * * 'without just compensation being made therefor' substantially the provision found in the National Constitution. * * * The defendant must pay off the judgment before it can acquire title to the property entered upon, *and failing to pay it within a reasonable time after the compensation is finally determined, it becomes a trespasser and liable to be proceeded against as such.*" (Emphasis supplied)

The government actually had no tenure to the land underlying these buildings because it had not paid the compensation and its leasehold had expired and the defendants, as owners of the fee title, had a right of pos-

session superior to that of the government, and the buildings, as fixtures, were theirs as a part of the real estate.

However, even if the government had not lost its title by reason of the failure to pay the compensation, the leasehold had further expired under the terms of the condemnation proceeding because of the fact that more than three years had expired since the termination of the emergency under which the condemnation proceeding was had.

Defendants are the owners of the land upon which the buildings in question stand. As such, they are also the owners of fixtures, including buildings that remained thereon when the Government's tenancy expired. The Government's tenancy was not effective when these buildings remained on the site after the removal date, and even if the buildings had not been sold to defendants, they would be the owners thereof by reason of their ownership of the land. Plaintiff's estate in the land upon which the buildings stand is dependent upon a condemnation proceedings. That proceeding resulted in a declaration of taking dated June 16, 1945, under which the Government got the following estate (Pl. Ex. 20):

> "The estate taken for said public use is the exclusive use of the lands described in said Schedule A for a period of one year with the right to renew from year to year for the duration of the existing national emergency and three years thereafter, to-

> gether with the right to remove at the termination of such use, all improvements constructed or placed thereon by or for the United States, except as set out in Schedule A."

The decree was modified by order entitled "Judgment Fixing Compensation and Directing Funds to Be Paid" (Def. Ex. A2) entered with respect to each parcel involved in this action. The pertinent language of each of the orders is identical. An example will be found in the order entered September 28, 1945, with reference to parcels 1, 2, 4, 8, 10, 12, 13, 14, 16, 18 and 19 owned by King County. Paragraph 3 of that order reads:

> "That the United States of America may exercise its right to renew the estate taken in said lands from year to year as provided in the declaration of taking without notice to said respondent, provided that no such renewal shall, without the consent of said respondent, *extend beyond three years after the termination of the existing national emergency.*" (Emphasis supplied)

Thus it will be seen that the tenure of the Government was only for the duration of the national emergency and three years thereafter. Extensions to carry more than three years beyond the end of the emergency could be had only with the consent of land owners.

It is to be noted that the decree is in terms of the *existing* national emergency. Consequently, a subsequently declared national emergency such as the Korean War emergency did not serve to extend the tenure. In the condemnation proceeding, compensation for the

tenure acquired by the Government was set in view of the situation then confronting the parties, namely, the existence of a war with Japan and Germany and the existence of national emergencies declared by proclamation of the President on September 8, 1939, and on May 27, 1941. The Government's tenure was limited to three years following the termination of that existing national emergency. Thereafter, on December 31, 1946, the President issued Proclamation No. 2714 reading as follows:

> "Now, therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the cessation of hostilities of World War II effective 12:00 o'clock Noon, December 31, 1946."

Thus ended the hostilities which were a part of the existing emergency at the time of the condemnation. On July 25, 1947, Congress passed a joint resolution 61 Stat. 449, which provided in Sec. 3:

> "In the interpretation of the following statutory provisions the date when the joint resolution becomes effective shall be deemed to be the date of the termination of any state of war heretofore declared by the Congress and of the national emergencies proclaimed by the President on September 8, 1939, and on May 27, 1941."

The resolution then lists a number of sections of federal statutes including several from the Federal Public Housing Act. One of these statutes was Sec. 1553 of Title 42, U.S.C.A., calling for the removal of Public Housing Administration temporary buildings upon the

termination of the emergency. Regulations of the Federal Public Housing Administration, as published in 24 Code of Federal Regulations, 3405C, recite that under this resolution the emergency ended July 25, 1947, for purposes of requiring the removal of housing under that section. The resolution also listed Sec. 1475 of Title 42 U.S.C. relating to the use of certain governmental facilities under the public housing program. The resolution also referred to Par. C of Sec. 1543 of Title 42, U.S.C., relating to the handling of fiscal matters under the Federal Public Housing Administration. Surely here was a congressional declaration of the termination of the emergencies. Certainly, after the adoption of this resolution the emergency was not the same one that existed when the order of taking was entered. Now the emergency had been modified by the cessation of hostilities and by an actual declaration that the emergencies declared by the President have ceased for certain purposes including purposes connected with federal public housing.

On the 8th day of September, 1951, the state of war between the United States and Japan was terminated by the signing of a treaty of peace with that country. By House Joint Resolution 289, approved by the President on October 19, 1951, the state of war with Germany was terminated. Now the legal state of war was terminated. Here again the emergency became different from the one under which the property involved in this case

was taken for public use. On April 29, 1952, by Proclamation No. 2974, 66 Stat. 31, the President declared:

> "Now, therefore, I, Harry S. Truman, President of the United States of America, do proclaim that the national emergencies declared to exist by the Proclamation of September 8, 1939, and May 27, 1941, are terminated this day upon the entry into force of the treaty of peace with Japan. * * * "

The Proclamation concluded as follows:

> " * * * and nothing herein shall be construed to affect the continuation of the said emergency of September 8, 1939, as specified in the Emergency Powers Interim Continuation Act approved April 14, 1952, for the purpose of continuing the use of property held under the act of October 14, 1940, Chap. 862, 54 Sta. 1125, as amended."

Here again the emergencies are terminated for all purposes, including, we submit, the purpose of terminating leaseholds for the duration of the war and three years thereafter.

By the resolution of April 29, 1952, the last vestige of the emergency under which the declaration of taking occurred was gone.

At this point, we believe it is well to call attention to the distinction between the extension of powers on the part of government agencies so that they may continue to exercise their functions and the extension of a lease or tenure acquired from an individual citizen. In considering a leasehold condemned by eminent domain proceedings, we are dealing with an involuntary con-

tract forced upon the citizen by the Government. The Government cannot, any more than an individual, by unilateral action change the conditions of such a contract. When the order of the court specified that the estate taken was a leasehold for the duration of the existing emergency subject to renewal for three years thereafter, it reserved no right in the Government to extend or change the emergency or to alter the conditions under which the compensation for the taking had been fixed without a new condemnation.

Congress could, with full propriety, enact legislation to extend the right of certain officials to function or the effectiveness of certain laws which had originally been subject to termination upon the end of the emergency. *Congress could not, constitutionally, pass an act that would take the property of its citizens by extending the tenure beyond that which was fixed by the court.* Such an act would be taking property *without due process of law.* Congress did not undertake to do any such thing. By public law 313 of the 82nd Congress, 66 Stat. 54, enacted April 14, 1952, known as the Emergency Powers Interim Continuation Act, Congress declared as follows:

> "Whereas, the existing state of war with Japan is the last described state of war to which the United States is a party, and the termination thereof and the national emergencies proclaimed in 1939 and 1940 would render certain statutory provisions inoperative; and,

"Whereas, some of these statutory provisions are needed to ensure the national security and the capacity of the United States to support the United Nations in its efforts to maintain world peace; and,

"Whereas, in view of the impending termination of this state of war, it is desirable to extend these needed statutory provisions immediately to June 1, 1952, to permit further consideration of a more extended continuation; now therefore, be it resolved. * * *

"That notwithstanding the termination hereafter of the war with Japan * * * and the emergencies proclaimed by the President on September 8, 1939, and May 27, 1941. * * *

"(a) Except insofar as they otherwise have further effectiveness, the following statutory provisions and the authorizations conferred and the liabilities imposed thereby shall remain in full force and effect to and including June 1, 1952. * * * "

The Act then listed a number of statutes including certain sections of the Federal Public Housing Act. It will be noted that this Interim Continuation Act merely keeps in effect certain statutes. It does not undertake to keep in effect contracts with individuals or tenancies acquired from individuals which were subject to determination upon the end of the emergencies. The finality of the proclamation of the President, dated April 29, 1952, terminating the emergencies, was not restricted by its last clause relative to the Emergency Powers Interim Continuation Act, insofar as this case is concerned. The Emergency Powers Interim Continuation

Act merely continued in force certain statutes. It did not continue in force any tenancies or contracts. The President's proclamation No. 2974 was definitely the end of the existing emergencies that were effective when the declaration of taking in this case occurred, and there was no reservation that detracted from that effectiveness.

We believe that the emergency actually ended with the declaration of Congress of July 25, 1947. It may be argued by government counsel that an emergency declared by the President cannot be terminated by Congress. If we concede this to be true, then the very latest date upon which the emergency ended was the date of the Presidential declaration of April 29, 1952. A case closely in point is *Werner v. U. S.* (S.D. Cal.) 119 F.Supp. 894, which involved a lease which was subject to renewal for the duration of the emergency and six months thereafter. The court there held that such a tenancy was definitely ended six months after the declaration of the President of April 29, 1952.

The lower court allowed damages based upon earnings up to November 16, 1955. By no theory could the government have held tenure to the land up to that date. Even if the accounting was relevant as to damages, it was grossly erroneous in ignoring the infirmities of the Government title. Title to the buildings and to the land was merged in the present owners who are the defendants in this case. The Government was without any au-

thority over the lands and had no right to an accounting for their use. Under no valid theory could the government be entitled to an accounting for profits from land or buildings it did not own or have a right to. The government wholly failed to establish any damages suffered by it in this case, and there was no right to an accounting for profits in this case. The government's rights were set out in the contract and there was a total failure of proof with respect to damages. It was error for the court to allow the accounting, or to enter an order awarding damages based upon the accounting since the result of the accounting was in no way related to the value of the government's leasehold and actually the government had no leasehold, and the lower court was in error in awarding any damages at all in view of the government's failure to prove such damages.

Respectfully submitted,

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and

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